APPENDICES

APPENDIX A

Filed April 20, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7372

TED MARK MONK,

Appellant

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY;
QUALITY ELECTRIC SUPPLY COMPANY

On Appeal from the District Court of the Virgin Islands
Division of St. Croix
(D.C. Civil Action No. 91-cv-00077)

Argued December 5, 1994

Before: SLOVITER, *Chief Judge*,
SCIRICA and COWEN, *Circuit Judges*

(Filed April 20, 1995)

OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

In this appeal, we are required to interpret and apply various sections of the Restatement (Second) of Torts to a lawsuit arising from a tragic construction accident in the Virgin Islands. The primary issue is the viability of Restatement section 343A, involving the doctrine of assumption of risk, in light of the Virgin Islands' adoption of a comparative negligence statute. We also consider whether employers may be liable for injuries to their independent contractors' employees under Restatement section 413 and similar provisions. The district court granted summary judgment to the defendant landowner, holding that the Restatement provisions shielded it from tort claims by a worker injured on the property. We will affirm.

I.

In June 1990, a fire destroyed a building on St. Croix owned by Quality Electric Supply Company. The following month Quality Electric contracted with Benak Construction Company to demolish the remains of the original structure and to construct a new building. Ted Monk, Sr., a partner in Benak and head of the project, named his son, Ted Monk, Jr. ("Monk"), as foreman of the site.

At the time of construction, the Virgin Islands Water & Power Authority ("WAPA") maintained 7,200-volt power lines several feet above part of the proposed building. The power lines were clearly visible, and there is no dispute that everyone involved with the project knew about the lines and that any contact with them would be dangerous.[1] On November 8, 1990, a crane was being

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[1] As the district court noted, the Benak supervisor at the site, Paul Christoff, testified in his deposition that "everyone present at the work site know that the lines were energized. In fact, Christoff heard Monk. Sr., specifically tell his son, the plaintiff,

used to lift steel joists that would connect the columns of the building frame. The first joist was installed with the use of a "tag line," a rope attached to the beam to prevent it from swinging. Monk decided not to use a tag line to install the next joist, however, because he thought he could better control the joist from swinging by holding it directly with his hands. At this point, Monk, Sr., yelled for his son to use a tag line. As Monk prepared to do so, the steel joist touched an overhead power line, sending an electrical current through his body. He suffered severe burns that resultsd in the amputation of both his legs and his left arm.

Monk then filed this suit for personal injuries against Quality Electric and WAPA. The district court granted summary judgment in favor of Quality Electric, but denied summary judgment to WAPA. *Monk v. Virgin Islands Water & Power Auth.*, No. 91-0077 (D.V.I. Jan. 24, 1994). Monk settled with WAPA, but appealed the district court's judgment as to Quality Electric.

The district court had jurisdiction of the case pursuant to 48 U.S.C. § 1612 (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988), and our review of a grant of summary judgment is plenary. *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 989 F.2d 635, 637 (3d Cir. 1993). Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

II.

In the Virgin Islands, the various Restatements of law provide the rules of decision in the absence of local laws

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to be careful of the lines because they were 'hot.'" *See Monk v. Virgin Islands Water & Power Auth.*, No. 91-0077, slip op. at 3 n.2 (D.V.I. Jan. 24, 1994). For direct evidence of the plaintiff's knowledge of the power lines and their danger, see *infra* part II.C.

to the contrary. V.I. Code Ann. tit. 1, § 4 (1967);[2] *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1033 (3d Cir. 1987). We are called upon here to determine whether section 343A of the Restatement (Second) of Torts (1965) survives enactment of the Virgin Islands comparative negligence statute.

A.

At common law, a plaintiff's contributory negligence barred any subsequent recovery for damages, even if the plaintiff was only slightly at fault. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §§ 65, 67, at 451-52, 468-69 (5th ed. 1984); Restatement (Second) of Torts § 467. Similarly, the common law doctrine of assumption of risk prevented recovery when a plaintiff was deemed to have assumed the risk of a known danger. Keeton et al., supra, § 68, at 495-96; Restatement § 496A.

While these rules were still in force throughout most of the United States, the American Law Institute incorporated section 343A on "Known or Obvious Dangers" into the Restatement (Second) of Torts. Section 343A provides in relevant part:

> A possessor of land is not liable to his invitees[3] for physical harm caused to them by any activity or

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[2] V.I. Code Ann. tit. 1, § 4 (1967) provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

[3] The Restatement definition of "invitee" includes a "business visitor," which is defined as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement § 332. There is no dispute that Monk is an "invitee," within the meaning of the Restatement.

> condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(footnote added). Section 343A's focus on dangers "known or obvious" to invitees, along with pertinent commentary,[4] indicated it was intended as a variation on the doctrine of assumption of risk. *See, e.g., Koutoufaris v. Dick*, 604 A.2d 390, 395-96 (Del. 1992) (noting section "343A's apparent espousal of assumption of risk as a bar to recovery").

Soon after adoption of the Second Restatement in 1965, however, the principle of apportioning damages between negligent plaintiffs and defendants under a comparative fault system began "veritably sweeping the land." Keeton et al., *supra*, § 67, at 479. "Although by the mid-1960s only seven states had replaced contributory negligence with comparative fault, several states switched over in 1969, and the 1970s and early 1980s witnessed a surge of legislative and judicial action accomplishing the switch." Id. at 471 (footnotes omitted). All but four states now have adopted the doctrine.[5]

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[4] For example, comment e to section 343A provides:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

[5] Those four states are Alabama, Maryland, North Carolina, and Virginia. *See* Jean W. Sexton, Recent Decision. *Tort Law—*

The movement toward comparative negligence, however, raised questions concerning the continued viability of the assumption of risk defense,[6] which often resembled contributory negligence.[7] *See, e.g., id.* § 68, at 495 ("The

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Assumption of Risk and Pennsylvania's Comparative Negligence Statute: Howell v. Clyde, 67 Temp. L. Rev. 903, 903 & n.2 (1994); *see also Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993); *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 905 (Md. 1983); *Campbell v. Baltimore Gas & Elec. Co.*, 619 A.2d 213, 219 (Md. Ct. Spec. App.), *cert. denied*, 627 A.2d 538 (Md. 1993); *Miller v. Miller*, 160 S.E.2d 65, 73 (N.C. 1968); *Bowden v. Bell*, 446 S.E.2d 816, 819 (N.C. Ct. App. 1994); *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987).

[6] Our discussion involves only the implied form of assumption of risk, not a defense based on an express contract. Defense based on express assumption of risk remain valid in virtually all jurisdictions. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 496 (5th ed. 1984) (footnotes omitted) ("[A]bsent policy reasons for prohibiting contractual disclaimers of this type in certain contexts, an express assumption of risk by the plaintiff should continue to serve as a total bar in comparative negligence cases."); 1 J.D. Lee & Barry A. Lindahl, *Modern Tort Law* § 9.07, at 250 (1988) ("in jurisdictions which have adopted comparative fault statutes, it has generally been held that the defense of express assumption of risk survives the enactment of such statutes."); 3 Stuart M. Speiser et al., *The American Law of Torts* § 13.39, at 808 (1986) ("Express assumption of risk, as distinguished from implied assumption of risk, has retained its viability as an absolute defense despite the advent of comparative negligence. This proposition is supported by cases from numerous jurisdictions.").

[7] For a discussion of the different forms of assumption of risk, *see infra* part II.B; *cf.* Restatement § 496A cmt. c; Keeton, *supra*, § 68, at 480-81 & 481 n.10. For purposes of this case, we adhere to the distinctions noted in *Keegan v. Anchor Inns, Inc.*, 606 F.2d 35, 39-41 (3d Cir. 1979). As we explained in *Keegan*, "Assumption of risk in its secondary sense is ordinarily synonymous with contributory negligence and involves a failure to exercise reasonable care for one's own safety. . . . Assumption of risk in its primary and strict sense involves voluntary exposures to an obvious or known danger which negates liability." *Id.* at 39 n.5 (citations omitted).

rise of comparative negligence has forced the courts and commentators to consider afresh the proper role for the assumption of risk defense."). Some jurisdictions that abolished contributory negligence also eliminated assumption of risk by statute.[8] Other states left the issue for their courts to decide, which resulted in a range of decisions across the spectrum.[9] Most courts rejected the defense,[10] others continued it, and some supported certain forms of it but rejected others.[11]

Depending upon their position on the viability of assumption of risk, courts also decided whether to continue using section 343A of the Restatement. As with assumption of risk generally, some courts opted to continue using

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[8] "[S]everal comparative negligence statutes by their terms abolish assumption of risk, in addition to contributory negligence, as defenses that will bar liability altogether." Keeton et al., *supra*, § 68, at 495-96 (citing several cases and statutes); *see also* Speiser et al., *supra*, § 13:33, at 787 ("There are a number of jurisdictions in which implied assumption of risk was abolished by statute.").

[9] Keeton et al., *supra*, § 68, at 496 ("Most of the statutes, however, are silent on assumption of risk, and so the matter has been thrown over to the courts."); *Speiser et al., supra*, § 13:33. at 787 ("[I] most jurisdictions, the statute by which comparative negligence was enacted did not expressly deal with assumption of risk, leaving it to the courts to deal with the viability of the doctrine . . . .").

[10] *See, e.g.*, Lee & Lindahl, *supra*, § 9.05, at 246 ("[M]ost states have allowed the entire concept [of assumption of risk] to be subsumed within comparative negligence by either abrogating it or providing for its merger with comparative fault principles."); *Speiser et al., supra*, § 13:33, at 787 ("[T]here are a number of jurisdictions, decidedly representing a minority, in which assumption of risk was retained as a separate defense under the comparative negligence system.").

[11] For a state-by-state analysis of the viability of assumption of risk after adoption of comparative negligence, see *Speiser et al., supra*, §§ 13:33-:39. at 784-809; *see also* Keeton et al., *supra*, § 68, at 495-498; *Lee & Lindahl, supra*, § 9.05, at 245-247.

section 343A,[12] others decided against it, and still others decided the applicability of section 343A depended on the type of assumption of risk involved.[13]

B.

In 1973, the Virgin Islands abolished the common law rule that a plaintiff's contributory negligence barred any recovery. In its place, it adopted a comparative negligence statute that apportioned fault between the plaintiff and defendant. *See* V.I. Code Ann. tit. 5, § 1451 (Supp. 1993);[14] *Keegan v. Anchor Inns, Inc.*, 606 F.2d 35, 37-38 (3d Cir. 1979). Monk contends this statute implicitly abolished assumption of risk as a defense, thereby contradicting Restatement section 343A and nullifying its viability.

In *Keegan, id.* at 37-41, we examined the Virgin Islands comparative negligence statute and its effect on the doctrine of assumption of risk. We held the statute abrogated

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[12] *See, e.g., Carrender v. Fitierer*, 469 A.2d 120, 124-25 (Pa. 1983).

[13] *See, e.g., Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992) (rejecting use of section 343A when the alleged assumption of risk was secondary type, but noting that it "might well" apply when assumption of risk was primary type). For a summary of judicial opinion regarding the applicability of section 343A in comparative negligence jurisdictions, see *id.* at 395-98.

[14] V.I. Code Ann. tit. 5, § 1451(a) (Supp. 1993) provides in relevant part:

> In any action based upon negligence to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff. The burden of proving contributory negligence shall be on the defendant. If such claimant is found by the trier of fact to be more at fault than the defendant, or, in the case of multiple defendants, more at fault than the combined fault of the defendants, the claimant may not recover.

one type of the assumption of risk defense, but left the other form intact:

> Assumption of risk is not necessarily grounded on the concept of fault. Sometimes the defense has been invoked when the plaintiff's conduct could be characterized as negligent; sometimes it has been invoked in its "strict" or "primary" sense when the conduct amounted to consent. In those cases where the plaintiff's conduct amounts to negligence, that fact should be accorded weight only within the comparative scheme of the statute. In such a case assumption of risk is not available as a bar to recovery. . . . It follows that when conduct amounts to a voluntary waiver or consent the absolute bar to recovery should remain.

Id. at 40. We employed this distinction between the two types of assumption of risk in *Smollett v. Skayting Development Corp.*, 793 F.2d 547 (3d Cir. 1986). In *Smollett*, a woman injured while ice skating sued the operator of the rink, complaining that the lack of guardrails and the carpeted floor surrounding the ice caused her injuries. The jury found for the plaintiff, and the district court denied the defendant's motion for a judgment notwithstanding the verdict. On appeal, we reversed and directed the district court to enter judgment for the defendant, holding that the evidence showed the plaintiff "fully understood the risk of harm to herself and voluntarily chose to enter the area of risk. She, therefore, implicitly assumed the risk of injury." *Id.* at 548 (citation omitted). In so ruling, we reiterated the comparative negligence statute's effect on assumption of risk:

> Assumption of risk is still available as a complete defense to a negligence claim but it has been limited by enactment of the comparative negligence statute. Assumption of risk, to the extent it incorporates the concept of fault on the part of the actor and, there-

> fore, overlaps with contributory negligence, is no longer available as a defense. However, assumption of risk can still be applied to "non-negligent conduct which constitutes waiver or consent" but which involved no negligence. In such cases the absolute bar to recovery remains.

Id. (quoting *Keegan*, 606 F.2d at 41 n.8). Therefore, the "primary" form of assumption of risk remains a viable defense in the Virgin Islands.[15] Because Restatement sec-

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[15] We disagree with Monk's assertion that the judicial rejection of sections 343 and 343A under federal admiralty law controls this case. It is true that we have held those Restatement sections inapplicable to actions arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). *See Davis v. Portline Transportes Maritime International*, 16 F.3d 532, 542 n.7 (3d Cir. 1994) (noting that "[s]ome portions of the Restatement's approach, however, clearly do not fit within the paradigm the Act constructs" and citing section 343A as an example); *Rich v. United States Lines, Inc.*, 596 F.2d 541, 551 n.21 (3d Cir. 1979) ("Sections 343 and 343A of the Restatement (Second) of Torts . . . are both inconsistent with Section 905(b) and therefore should not be relied upon to create a duty on the part of the ship owner."); *see also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 168 n.14 (1981) (stating that "those sections, while not irrelevant, do not furnish sure guidance in cases such as this"). But we rejected those sections because Congress, in amending the Longshore and Harbor Workers' Compensation Act, expressly indicated its intent to abolish assumption of risk when it eliminated contributory negligence. *See id.* at 166 n.13 ("The Committees also anticipated that in § 905(b) cases, as in other admiralty cases, the rule of comparative negligence would apply and the defense of assumption of risk would be barred."); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 ("[T]he Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable."). Similarly, some state legislatures also barred assumption of risk when they approved comparative negligence statutes. *See supra* note 8 and accompanying text.

In abolishing contributory negligence, however, the Virgin Islands legislature never gave any indication whether it intended

tion 343A requires a plaintiff's implicit acquiescence to "known or obvious dangers," the essence of the primary form of assumption of risk, this Restatement provision also remains valid under Virgin Islands law.

We recognize our holding on assumption of risk may not represent the view of a majority of jurisdictions.[16] But many of the contrary cases are distinguishable, largely because relevant statutes eliminating contributory negligence often expressly barred the assumption of risk defense.[17] Furthermore, we have interpreted the statute in this manner consistently since its 1973 enactment. We acknowledge the existence of strong policy reasons for completely abandoning the doctrine of assumption of risk as an absolute bar to recovery,[18] just as there are compelling reasons to maintain the defense in its limited form.[19] But unlike other jurisdictions, where the Restate-

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to bar assumption of risk. Thus, the martime actions are distinguishable. In any event, as the Supreme Court has stated, "maritime negligence actions are not necessarily to be governed by principles applicable in nonmaritime contexts." *Scindia Steam*, 451 U.S. at 168 n.14.

[16] *See supra* note 10 and accompanying text.

[17] *See supra* note 8 and accompanying text.

[18] *See, e.g., Sexton, supra*, at 905 ("[A]ssumption of risk clearly circumvents the purpose of the comparative negligence statute by precluding recovery even if the plaintiff's actions were reasonable or caused only one percent of the total harm . . . ."); *see also id.* at 903 & n.4 (listing commentators who "advocate the complete abolition of the assumption of risk defense").

[19] *See, e.g.*, Keton et al., *supra*, § 68, at 496 (footnotes omitted) (" '[P]rimary' implied assumption of risk should also logically continue to be an absolute bar after the adoption of comparative fault . . . . This is because assumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff."); *see also Sexton, supra*, at 903 & n.3 (listing commentators supportive of the continuation of assumption of risk under comparative negligence).

ment merely serves as a summary of general legal principles for courts to accept or reject, the Virgin Islands has designated the Restatement as its law, until a contrary statute is approved.[20] Therefore, if the Virgin Islands wishes to abrogate the doctrine of assumption of risk, along with section 343A of the Restatement, its legislature must say so, as it did in 1973 with contributory negligence.

C.

In applying section 343A of the Restatement to this case, the district court granted summary judgment to Quality Electric because "it was Monk's decision not to use a tag line and instead to hold onto the metal beam that precipitated his injuries. Monk cannot now try to shift the liability to Quality Electric simply because they owned the land where the work was performed." *Monk*, No. 91-0077, slip op. at 12.

To the extent the district court based its decision on Monk's negligence (or contributory negligence), we believe it erred. Instead, the court should have focused on evidence demonstrating Monk's awareness of and consent to a "known or obvious" danger. Evidence of Monk's negligence is relevant only to show the type of secondary assumption of risk that "incorporates the concept of fault on the part of the actor and, therefore, overlaps with contributory negligence." *Smollett*, 793 F.2d at 548. As we have held, such evidence is no longer permitted in the Virgin Islands to bar a plaintiff's cause of action, but rather only may be used to apportion fault between plaintiffs and defendants. *Id: Keegan*, 606 F.2d at 39-41.

Nevertheless, as in *Smollett*, we have little difficulty in concluding as a matter of law that plaintiff "fully understood the risk of harm to h[im]self and voluntarily chose to enter the area of risk." 793 F.2d at 548. Al-

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[20] *See supra* note 2.

though the issue of whether a danger was "known or obvious" generally is a question of fact for a jury. *cf.* Restatement § 496D cmt. e. there is no dispute in this case that Monk actually knew of the risk posed by the power lines. As the district court noted, "At all relevant times, the Benak Construction crew knew that the power lines were energized and posed a possible danger." *Monk*, No. 91-0077, slip. op. at 3. In his deposition, Monk admitted that "I did pay attention to the location of the lines. I looked at them, everybody else on the job had looked at them." He stated he knew that "if somebody came in contact with [the power lines], then they were going to get electrocuted, get hurt." *Id.* at 4 n.2. As foreman, Monk testified he warned others about the danger posed by the power lines: "[A]s I said earlier, I was always trying to stress how dangerous they were and to be careful around them." *Id.* Although Monk contends he did not know the lines were uninsulated and the level of their voltage, these factors do not change the fact that he knew the location of the lines and that they posed a serious danger. Thus, he "assumed the risk of injury." *Smollett*, 793 F.2d at 549.[21]

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[21] Section 343A provides that owners of land are not liable to invitees for "known or obvious" dangers, "unless the possessor should anticipate the harm despite such knowledge or obviousness." The Restatement commentary provides guidance on the meaning of this exception to the rule:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Restatement § 343A cmt. f. This exception does not apply in circumstances like the present, in which the visitor on the land

Monk aso asserts that Quality Electric violated its duties under section 343 of the Restatement (Second) of Torts, which involves "Dangerous Conditions Known to or Discoverable by Possessor."[22] We cannot agree. The Restatement provides that sections 343 and 343A "should be read together," with the latter section dealing "with the effect of the fact that the condition is known to the invitee, or is obvious to him . . . ." Restatement § 343 cmt. a. By contrast, section 343 is intended to apply "to protect invitees from non-obvious dangerous conditions on the land." *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1011 (3d Cir. 1992). *cert denied*, 113 S. Ct. 1417 (1993).[23] We have held that the power lines above

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has been hired precisely for the work that involves or creates the risk itself. In such circumstances, the landowner has no reason to expect that the visitor will be distracted or forget about the danger. Here, Monk's testimony reveals he was acutely aware of the power lines at the time of the accident, and that is why he chose to proceed without a tag line. *See Monk*, No. 91-0077, slip. op. at 4 & n.3. Indeed, as foreman, Monk repeatedly warned others to be careful around the power lines. *See* discussion in text.

[22] Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.

[23] *See also Rich v. United States Lines, Inc.*, 596 F.2d 541, 563 (3d 1979) (Garth, J., concurring) (citation omitted) (Sections 343 and 343A "establish that the 'possessors of land . . . are liable for physical harm caued to invitees by dangerous conditions which are not obvious to the invitee (§ 343), but are absolved from liability when dangerous conditions are known or obvious, except when the possessor should anticipate the harm despite the invitee's knowledge or the obviousness of the condition. (§ 343A).' ").

Quality Electric's land were both "known" and "obvious"; thus, section 343 does not apply here.

III.

Finally, Monk argues that Quality Electric violated its duty under Restatement section 413, which involves an employer's "Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor." Section 413 provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
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> (a) fails to provide in the contract that the contractor shall take such precautions, or
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> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

At common law, the general rule was that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Restatement § 409; *see also Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1036 (3d Cir. 1987). Yet, courts began recognizing so many exceptions to that rule "that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." Restatement § 409 cmt. b. The Restatement divided the exceptions into those based on an employer's direct negligence, *see* §§ 410-15, and those involving vicarious liability imposed on the employer due to the negligence of the independent contractor, *see* §§416-29. *See* Restate-

ment ch. 15, topic 2, introductory note, at 394. Therefore, any liability under section 413 must be based on an employer's direct negligence.

Quality Electric urges us to consider whether the word "others," under section 413 and elsewhere in chapter 15 of the Restatement, even encompasses an independent contractor's employees, thereby allowing them to file suit against their employer's employer for injuries sustained on the job. Courts for the Virgin Islands are divided on this issue,[24] as are other courts throughout the country.

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[24] In 1975, the District Court of the Virgin Islands ruled that the meaning of "others," under sections 416 and 427 of the Restatement, did not encompass employees of an independent contractor. *Munson v. Duval*, 11 V.I. 615, 630-33 (D.V.I. 1975). A decade later, in "reaffirm[ing]" that rule, the court noted:

> Time has proven the wisdom of Chief Judge Christian's holding in *Munson, supra*, as jurisdiction after jurisdiction issued a ruling to the same effect. The net result is that today, ten years later, the overwhelming number of jurisdictions are uniform in their interpretation of the word "others" in Chapter 15 of the Restatement of Torts, (Second), as excluding employees of independent contractors.

Gibson v. Sullivan Trail Coal Co., 608 F. Supp. 390, 392 (D.V.I.), *aff'd*, 782 F.2d 1028 (3d Cir. 1985); *see also Harris v. No. 1 Contracting Corp. Excavation Constr. Co.*, 22 V.I. 3, 7-9 (V.I. T.C. 1986) (applying *Gibson*).

Other courts in the Virgin Islands have attempted to limit such holdings to situations in which employers were sued under a vicarious liability theory. *See, e.g., Henry v. Hess Oil V.I. Corp.*, 191 St. Croix Supp. 115, slip op. at 23 (D.V.I. 1991) ("[S]ince the sole issue in [*Gibson*] was the employer's vacariuos liability, the court's citation of those sections concerning direct liability was dictum. Therefore, the Third Circuit's affirmation without opinion only went to the proposition that the employer of an independent contractor is not vicariously liable to the contractor's employees, which is consistent with this opinion."); *see also Olson v. Virgin Islands Tel. Corp.*, 1986 St. Thomas Supp. 204, slip op. at 3 (D.V.I. 1986); *Hood v. Hess Oil V.I. Corp.*, 650 F. Supp. 678, 679-80 (D.V.I. 1986). Thus, while the Virgin Islands courts agree that employers cannot be held vicariously liable to employees of their

See Keeton et al., *supra*, § 71, at 514 n.63 ("There is disagreement over whether the doctrine protects third parties only or includes as well the contractor's employees.").

A.

Section 413, as well as sections 416 [25] and 427,[26] essentially adopts the "peculiar risk" doctrine, which developed in the latter half of the nineteenth century out of a recognition that "a landowner whose chose to undertake inherently dangerous activity on his land should not escape liability for injuries to others simply by hiring an independent contractor to do the work." *Privette v. Superior Court*, 854 P.2d 721, 724-25 & n.2 (Cal. 1993) (in banc). The American Law Institute incorporated this doctrine in the Second Restatement under certain provisions of Chapter 15, which generally address the liability of employers of independent contractors when they or their contractors have been negligent.

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independent contractor, they are divided on whether such employees can sue the employers for their direct negligence based on Chapter 15 of the Restatement.

[25] Section 416 provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

[26] Section 427 provides:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

An early draft of the Second Restatement of Torts included a Special Note that excluded employees of the independent contractor from filing suit under its provisions. That note, which ultimately was not adopted, provided:

> *Special Note.* The rules stated in this Chapter are, in general, not applicable to make the defendant who hires an independent contractor liable to two classes of persons.
>
> One consists of the employees, or servants, of the defendant himself . . . .
>
> . . . .
>
> The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for their safety. The one exception which developed was that the servants of the contractor doing work upon the defendant's land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See § 343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor's servants. One reason why such responsibility has not developed has been that the workman's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workman's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that

> the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.
>
> Again, when the Sections in this Chapter speak of liability to "another" or "others," or to "third persons," it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included.

Restatement ch. 15 (Tentative Draft No. 7, 1962). The American Law Institute omitted this note, however, at the recommendation of William L. Prosser, the reporter for the Second Restatement. 39 A.L.I. Proc. 244-49 (1962). Prosser suggested the provision be dropped because of a lack of uniformity on the issue, particularly because of the effect of the various state workers' compensation acts. *Id.* at 246. Nevertheless, he stated that "certainly the prevailing point of view is that there is no liability on the part of the employer of the independent contractor." *Id.* at 247.

In the first decade after the adoption of the Restatement, courts split on whether to permit a contractor's employees to sue under the peculiar risk provisions of Chapter 15.[27] Since the early 1980s,

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[27] As the Washington Supreme Court noted in 1981:

> Other jurisdictions which have faced this issue are divided over whether employers of an independent contractor owe to the employees of the contractor a nondelegable duty of care based on the presence of an inherently dangerous activity. Several jurisdictions have held that a such a nondelegable duty is owed to employees of independent contractors. The overwhelming number of jurisdictions which have resolved this issue have found, however, that no duty is owed by an owner to employees of an independent contractor.

Tauscher v. Puget Sound Power & Light Co., 635 P.2d 426, 429 (Wash. 1981) (en banc) (citing numerous cases) (footnotes omitted).

however, an overwhelming majority of state high courts to consider the issue have held that employers are not liable to such employees,[28] with some even overruling prior interpretations of the Restatement.[29] A majority of our sister circuits have also so ruled when called upon to resolve the issue in cases under state[30] and

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[28] *See Privette v. Superior Court*, 854 P.2d 721, 730-31 (Cal. 1993) (in banc); *Dillard v. Strecker*, 877 P.2d 371, 385 (Kan. 1994); *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128, 131-32 (Mo. 1993) (en banc) (citing *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 390 (Mo. 1991) (en banc)); *Sierra Pac. Power Co. v. Rinehart*, 665 P.2d 270, 273 (Nev. 1983); *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1263 (N.M. 1987) (citing *New Mexico Elec. Serv. Co. v. Montanez*, 551 P.2d 634 (N.M. 1976)); *Tauscher v. Puget Sound Power & Light Co.*, 635 P.2d 426, 429-31 (Wash. 1981) (en banc); *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835, 841, 844 (Wis. 1988); *Stockwell v. Parker Drilling Co.*, 733 P.2d 1029, 1032 (Wyo. 1987) (citing *Jones v. Chevron U.S.A., Inc.*, 718 P.2d 890 (Wyo. 1986)); *cf. Rowley v. Mayor of Baltimore*, 505 A.2d 494, 503 (Md. 1986); *Vertentes v. Barletta Co.*, 466 N.E.2d 500, 502-04 (Mass. 1984); *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 404-07 (Minn. 1981); *Whitaker v. Norman*, 551 N.E.2d 579, 580 (N.Y. 1989); *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 454 (N.D. 1994). *But see Sievers v. McClure*, 746 P.2d 885, 887 n.2 (Alaska 1987); *Eliott v. Public Serv. Co.*, 517 A.2d 1185, 1188 (N.H. 1986).

[29] *See, e.g., Privette*, 854 P.2d at 726, 730 n.4 (overruling a line of cases stretching back more than 30 years); *Zueck*, 809 S.W.2d at 390.

[30] *See, e.g., Scofi v. McKeon Constr. Co.*, 666 F.2d 170, 172 (5th Cir. 1982) (Florida law); *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 940-42 (7th Cir. 1986) (Illinois law); *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212, 1217-19 (8th Cir. 1979) (Minnesota law), *cert. denied*, 444 U.S. 1033 (1980); *cf. Lipka v. United States*, 369 F.2d 288, 292-93 (2d Cir. 1966) (New York law), *cert. denied*, 387 U.S. 935 (1967). *But see Lindler v. District of Columbia*, 502 F.2d 495, 499 (D.C. Cir. 1974) (District of Columbia law).

We have previously noted that at least one jurisdiction within this circuit follows the "minority" rule. *See Toole v. United States*, 588 F.2d 403, 407 (3d Cir. 1978) (citing *Gonzales v. United States*

federal [31] law.

Most of these courts have not permitted employer liability to a contractor's employees for four fundamental reasons. First, following the reasoning of the Restatement's unadopted Special Note, courts have noted that workers' compensation statutes preclude employees from recovering against the independent contractor, even though it oversaw and permitted the unsafe working conditions, but do not bar suits against the contractor's employer. This result appears inequitable, particularly when the employer is indirectly paying the cost of the workers' compensation premiums:

Steel Corp., 374 A.2d 1334, 1339 (Pa. Super. Ct. 1977)). This result, however, does not bind us here. First, the Pennsylvania case we cited as our authority. *Gonzalez* was appealed to the Pennsylvania Supreme Court, which, in affirming, declined to decide this issue. *See Gonzalez v. United States Steel Corp.*, 398 A.2d 1378, 1384 n.10 (Pa. 1979) ("U.S. Steel argues that Section 410 (and Section 413) do not impose liability upon an employer of an independent contractor for injuries incurred by employees of the independent contractor. We agree, however, with plaintiffs that this contention was not preserved for our review."). *But see Lorah v. Luppold Roofing Co.*, 622 A.2d 1383, 1386 n.2 (Pa. Super. Ct. 1993) ("[I]t is apparent that the law in this Commonwealth is that employees of an independent contractor are parties under §§ 416 and 427 to whom an obligation can flow."). Second, an interpretation of the Restatement by one jurisdiction within this circuit does not compel the same interpretation for another such jurisdiction. In fact, we already have predicted that New Jersey would reject the minority rule that Pennsylvania may have adopted. *See Merklin v. United States*, 788 F.2d 172, 176 (3d Cir. 1986) ("New Jersey would prohibit the contractor's employees from recovering against the employer. The traditional approach holds that the inherently dangerous doctrine protects only third parties and not the contractor's employees.").

[31] *See, e.g., Chavis v. Finnlines, Ltd., O/Y*, 576 F.2d 1072, 1081 (4th Cir. 1978); *Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030, 1033-35 (5th Cir. 1977) (citing numerous cases), *cert. denied*, 435 U.S. 924 (1978); *Nelson v. United States*, 639 F.2d 469, 474-79 (9th Cir. 1980); *Eutsler v. United States*, 376 F.2d 634, 635-37 (10th Cir. 1967); *cf. Evans v. Transportacion Maritime Mexicana S.S. Campeche*, 639 F.2d 848, 859 (2d Cir. 1981).

> As one court observed, the "principal" who hires an independent contractor should be subject to no greater liability "than its [independent contractor] agent," whose exposure for injury to an employee is limited to providing workers' compensation insurance. Other courts have reasoned that the rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably has calculated into the contract price.

Privette, 854 P.2d at 728 (citation omitted).[32]

A second and related reason why courts have barred employees from recovering against their employer's employer is that such liability is not necessary to achieve the original aims of the doctrine of peculiar risk Liability under the doctrine is not necessary, in cases of injuries to a contractor's employees, because:

> the workers' compensation system of recovery regardless of fault achieves the identical purposes that underlie recovery under the doctrine of peculiar risk: it ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety.

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[32] For additional authority on this point, see *Dillard*, 877 P.2d at 385; *Zueck*, 809 S.W.2d at 390; *Fleck*, 522 N.W.2d at 451-52; *Tauscher*, 635 P.2d at 430-31; *Wagner*, 421 N.W.2d at 842-43; *Merklin*, 788 F.2d at 176.

Id. at 730; *see also Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 451 (N.D. 1994); *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835, 842-43 (Wis. 1988).

In fact, the third reason cited by courts for borbidding employer liability is that such liability may actually decrease workplace safety. Most employers probably would have little trouble determining those dangers that might be peculiarly risk to passers-by uninvolved in a construction project. As the Missouri Supreme Court noted, "Common sense permits a landowner to identify the potential of harm which an activity may create to persons not participating in the activity." *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 387 (Mo. 1991) (en banc). Yet, the risks to a contractor's workers and the protections necessary to reduce such risks "are often beyond the owner's expertise." *Id.*

> Independent contractors are frequently, if not usually, hired because the landowner is aware of his own lack of expertise and seeks to have the work performed as safely and efficiently as possible by hiring those possessing the expertise he lacks.
>
> If the landowner chooses to avoid the additional liability imposed by the inherently dangerous exception, he may choose to direct his own employees to do the work despite his and their lack of expertise. That simple choice limits the landowner's exposure to that provided under worker's compensation. But that choice also increases the risk of injury to the employees and to innocent third parties.

Id. at 387-88 (footnote omitted).[33] Furthermore, permitting employer liability to a contractor's employees also ignores "the fact that the economic system permits workers who presume to undertake dangerous work to bargain

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[33] *See also Dillard*, 877 P.2d at 385; *Fleck*, 522 N.W.2d at 452; *Tauscher*, 635 P.2d at 431; *Wagner*, 421 N.W.2d at 842.

for an enhanced reward for assuming the danger." *Id.* at 390 (footnote omitted); *see also Dillard v. Stecker*, 877 P.2d 371, 385 (Kan. 1994).

Finally, courts point out that employers need not be held liable to employees of an independent contractor under the peculiar risk provisions of Chapter 15 of the Restatement because other remedies exist besides workers' compensation. A contractor's employees, along with other invitees, still have the right to sue for certain latent defects on the land, *see* Restatement § 343, or for "known or obvious" dangerous whose harm should have been anticipated, *see id.* § 343A. *Tauscher v. Puget Sound Power & Light Co.*, 635 P.2d 426, 430 (Wash. 1981) (en banc); Restatement Special Note (unadopted), *supra.*

B.

We are persuaded by the reasoning of these courts; thus, we hold that, under Virgin Islands law, employees of an independent contractor are not included within the protected class of "others" under the peculiar risk provisions of Chapter 15 of the Restatement. We acknowledge that a minority of jurisdictions have held to the contrary. And we understand the concerns expressed by courts in those states, particularly that of holding tortfeasors liable for their actions and protecting workers on the job.[34] But we believe the interpretation chosen by the overwhelming

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[34] Courts that have held employers liable to such employees under section 413 offer a variety of reasons for their decisions. A few courts, noting that section 413 is a theory of direct liability, find it appropriate to hold employers liable for their own acts of negligence. *See, e.g. Moloso v. State*, 644 P.2d 205, 214-15 (Alaska 1982). Some courts point out that the Special Note to the Restatement, *see supra* part III.A, was not adopted and thus is not entitled to deference. *See, e.g., Lindler v. District of Columbia*, 502 F.2d 495, 498-99 (D.C. Cir. 1974). Other courts apparently following the minority view simply seem to be adhering to longtime precedent. *See, e.g., Bosak v. Hutchinson*, 375 N.W.2d 333, 338 (Mich. 1985).

majority of jurisdictions is the better rule, for the reasons already expressed.

We also believe this rule is consistent with the policies expressed in the Virgin Islands Workmen's Compensation Act, V.I. Code Ann. tit 24, §§ 251-85 (1993). As we have noted, this Act, like "others workers compensation legislation, is designated to 'provide prompt payment of benefits without regard to fault.' " *Chinnery v. Government of V.I.*, 865 F.2d 68, 71 (3d Cir. 1989) (citations omitted). But the Act's other fundamental purpose is "to relieve employers and employees of the burden of civil litigation." *Id.* We believe our interpretation of these sections of the Restatement furthers the latter purpose of the Act without impairing the former purpose.

As a final matter, we should clarify that this holding extends to actions under the direct liability provision of section 413, as well as the vicarious liability provisions of sections 416 and 427. The courts for the Virgin Islands have attempted to distinguish the two situations,[35] but the same reasoning applies to both.[36] In fact, most courts have cited section 413, as well as sections 416 and 427, in holding that employers are not liable to a contractor's employees under the doctrine of peculiar risk.[37]

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[35] *See supra* note 24.

[36] *See, e.g., Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128, 131 (Mo. 1993) (en banc) ("The same reasons . . . for rejecting a claim under 416 are equally persuasive to reject a claim under § 413."); *Stockwell v. Parker Drilling Co.*, 733 P.2d 1029, 1032 (Wyo. 1987) ("The same logic and reasoning applies to § 413, and we agree that § 413 also does not apply to the employee of an independent contractor."). Courts considering the issue have explicitly refused to distinguish between these Restatement sections just because two are under the vicarious liability part of Chapter 15 and the other is under the direct liability heading. *See Privette v. Superior Court*, 854 P.2d 721, 725 n.2 (Cal. 1993) (in banc); *cf. Dillard*, 877 P.2d at 378.

[37] *See Privette*, 854 P.2d at 725-26 & 725 n.2 (citing sections 413 and 416); *Dillard*, 877 P.2d at 375-85 (adopting reasoning of numerous cases deciding issue under sections 413, 416, and 427); *Matteuzzi*, 866 S.W.2d at 131-32 (citing *Zueck v. Oppenheimer*

C.

Applying this interpretation of the Restatement and its underlying reasoning to the facts of this case, it becomes clear why employers should not be held liable to an independent contractor's employees under section 413. The contract between the parties required Benak to obtain workers' compensation insurance; thus, as in the cases already noted, Quality Electric was "indirectly" paying for such coverage.

Furthermore, instead of using its own employees, who may have been unfamiliar with such work, Quality Electric hired Benak, a company experienced in working near power lines.[38] The accident here was tragic; such work, however, might routinely be deadly if Quality Electric

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Gateway Properties, Inc., 809 S.W.2d 384, 386 (Mo. 1991) (en banc)) (citing sections 413, 416, and 427); *Sierra Pac. Power Co. v. Rinehart*, 665 P.2d 270, 273 (Nev. 1983) (citing sections 413 and 416); *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1263 (N.M. 1987) (citing *New Mexico Elec. Serv. Co. v. Montanez*, 551 P.2d 634 (N.M. 1976)) (citing sections 413, 416, and 427); *Tauscher v. Puget Sound Power & Light Co.*, 635 P.2d 426, 429-30 (Wash. 1981) (en banc) (citing sections 413, 414, 416, and 427); *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835, 841, 844 (Wis. 1988) (citing sections 413, 416, and 427); *Stockwell*, 733 P.2d at 1032 (citing *Jones v. Chevron U.S.A., Inc.*, 718 P.2d 890 (Wyo. 1986)) (citing sections 413 and 416).

Other state high courts have decided that employers are not liable to an independent contractor's employees under sections 416 and 427, but did not discuss whether the rule applies to section 413. *See, e.g., Vertentes v. Barletta Co.*, 466 N.E.2d 500, 502-04 (Mass. 1984); *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 404-07 (Minn. 1981); *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 454 (N.D. 1994); *cf. Rowley v. Mayor of Baltimore* 505 A.2d 494, 503 (Md. 1986).

[38] As the district court noted, deposition testimony revealed that "Benak Construction had worked on other projects where the power lines were in an even closer vicinity than in the instant case, and Benak Construction did not consider the situation at the Quality Electric site to be a problem." *Monk*, No. 91-0077, slip op. at 10 n.9.

and other landowners used their own inexperienced workers merely to avoid liability to third parties.

We also fail to see what more Quality Electric reasonably could have done to increase safety. There is no question that officials from Quality Electric and Benak discussed the power lines and their dangers. *Monk*, No. 91-0077, slip op. at 8-9. It also is beyond dispute that, after these discussions, Benak supervisors contacted WAPA about the power lines and that the contract required Benak to assume the responsibility for the work site and related safety precautions. *Id.* at 9. Although the power lines traveled over Quality Electric's land, they did not service Quality Electric but rather an adjacent property. *Id.* at 3 n.1. And it is clear that Quality Electric officials had given control of the site over to the independent contractor while they worked in temporary offices nearby. *Id.* at 7-8. Under these circumstances, the contractor, not Quality Electric, was in the best position to gauge what measures were necessary to protect the workers at the site from danger.

IV.

Based on the foregoing reasons, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

[Filed Feb. 4, 1994]

IN THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil Action No. 1991/0077

TED MARK MONK

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY &
QUALITY ELECTRIC SUPPLY CO.

MEMORANDUM

CAHN, J. January 24, 1994

This case involves an unfortunate accident that occurred approximately three years ago. On November 8, 1990, Ted Mark Monk ("Monk" or "plaintiff"), an employee of Benak Construction Company ("Benak Construction"), suffered electrical burns when a metal beam he was touching came into contact with energized power lines maintained by the Virgin Islands Water and Power Authority ("WAPA"). As a result of the accident, Monk underwent a triple amputation. Monk has sued both Quality Electric Supply Company ("Quality Electric"), the owner of the land on which the construction work was being performed and the employer of Benak Construction, and WAPA, for negligence and failure to maintain a safe work place. Jurisdiction is based on 4 V.I.C. § 32. Currently before the court are motions for summary judg-

ment by each of the two defendants. The court addresses each motion seriatim.

I. *Summary Judgment Standard*

The Federal Rules of Civil Procedure provide that summary judgment is appropriate if "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of "showing—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party must then go beyond the pleadings to "establish the existence of each element on which it bears the burden of proof," *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

When considering a motion for summary judgment, the court must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court may not make credibility determinations or weigh the evidence. *Id.* at 252. If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. *Facts*

The following material facts are undisputed. Following a fire that destroyed its building, Quality Electric decided to rebuild its demolished warehouse and retail store. Quality Electric hired independent contractor Benak Construction to erect the steel frame of the new building. The plaintiff's father, also named Ted Monk ("Monk,

Sr."), was a partner in Benak Construction and headed the project. Monk, Sr., made his son, the plaintiff, foreman of the site.

At the time Benak Construction began building on Quality Electric's property, WAPA's uninsulated 7,200-volt overhead energized power lines ran from east to west along the north side of the property.[1] At all relevant times, the Benak Construction crew knew that the power lines were energized and posed a possible danger.[2] The plans called for portions of the steel frame to be constructed in close proximity to the overhead lines.

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[1] The location of the power lines met and exceeded the National Electric Safety Code ("NESC") requirements. However, this alone is not determinative of the issue of negligence. *See generally Folks v. Kansas Power and Light Co.*, 755 P.2d 1319, 1326 (Kan. 1988) ("[I]t is the general rule that conformity with the NESC or an industry-wide standard is not an absolute defense to negligence.").

Additionally, it should be noted for the sake of clarification that the power lines did not service the Quality Electric work site but rather brought power to the property located behind Quality Electric's land.

[2] According to Paul Christoff ("Christoff"), the superintendent at the site, everyone present at the work site knew that the lines were energized. In fact, Christoff heard Monk, Sr., specifically tell his son, the plaintiff, to be careful of the lines because they were "hot." (Dep. of Christoff at 15, 42.)

Monk's deposition testimony reveals that he was acutely aware of the danger posed by the energized lines: "I did pay attention to the location of the lines. I looked at them, everybody else on the job had looked at them." (Dep. of Monk at 27.) Later in the same deposition, Monk answered in response to a question about whether he knew the lines posed a possible danger: "[I]f somebody came in contact with them, then they were going to get electrocuted, get hurt." (Dep. of Monk at 31.) Finally, Monk, in his role as foreman, not only registered the danger himself but warned others about the possible risk: "[A]s I said earlier, I was always trying to stress how dangerous they were and to be careful around them." (Dep. of Monk at 38.)

On November 8, 1990, at Monk's direction, a crane operator came to the site for the express purpose of lifting the 30-foot metal bar joists that were to become a part of the steel frame. The first metal joist was successfully installed with the use of a "tag line," a rope attached to the beam to prevent the beam from swinging. However, when it came time to install the second joist, Monk decided not to use a tag line because he thought he would have better control over the beam without the line.[3]

As Monk held onto one end of the suspended joist and signalled the crane operator with his other hand, Monk, Sr., yelled out to his son "Stop. Why don't you put a tag line on it?" (Dep. of Monk at 46.) Monk said he was prepared to do just that when the joist came into contact with the power lines sending an electrical current through his body.[4] As a result of the accident, Monk sustained severe burns resulting in a triple amputation.

III. *Quality Electric's Motion for Summary Judgment*

A. *Claim of Negligence*

Monk has sued Quality Electric for negligence, alleging, *inter alia*, that Quality Electric failed to warn Monk of the dangers presented by the power lines and failed to provide him with a safe work place. *See* Complaint at ¶ 15.

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[3] As Monk explained it: "[I] chose not to put the tag line on the end because the power lines were pretty close and, you know, as always its pretty breezy down there, they're swaying around a little bit, and I wanted as much control on the joist as I could." (Dep. of Monk at 45.)

[4] All of the parties agree that it is not entirely clear how the beam came into contact with the power lines. The parties have offered several theories including that the crane operator misinterpreted Monk's hand signals, or that perhaps the beams swayed due to the wind. However, it is not necessary to decide how the accident occurred in order to rule on the instant motions.

Quality Electric argues that it is entitled to summary judgment on the negligence claim because the employee of an independent contractor has no recourse against the one who hired the independent contractor. Quality Electric cites to a litany of cases which hold that under Virgin Islands law, an employer of an independent contractor is not *vicariously* liable to an employee of an independent contractor who is injured at the work site. *Gibson v. Sullivan Trail Coal Co. and Virgin Islands Port Auth.*, 608 F. Supp. 390, 391 (D.V.I. 1985) (citing *Munson v. Duval*, 11 V.I. 615 (D.V.I. 1975), *aff'd without op.*, 782 F.2d 1028 (3d Cir. 1985).

As the plaintiff correctly points out, those cases do not end the inquiry because Monk bases his claim on direct negligence, rather than vicarious liability. *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1036 (3d Cir. 1987) ("As a general rule, employers of independent contractors are not vicariously 'liable for physical harm caused to another by an act or omission of the contractor.' . . . However, the employer of a contractor may be liable to others for harm caused by its own negligence.") (citations omitted); *Dubique v. Antilles Inv. Corp.*, No. 1989-1 (D.V.I. Dec. 11, 1990) (holding that an employer of an independent contractor is not shielded from liability for injuries caused by its own negligence). Thus, the issue presented is whether any of the exceptions to the general rule of non-liability set forth in Restatement (Second) of Torts [hereinafter Restatement (Second)] § 409 apply.[5]

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[5] In the Virgin Islands, in the absence of local laws to the contrary, the principles of the Restatement provide the rules of decision. 1 V.I.C. § 4. *See also Williams*, 817 F.2d at 1033.

Restatement (Second) Section 409, entitled "General Principle," provides:

> Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Monk maintains that Quality Electric is liable under Restatement (Second) § 413 which provides for liability when an employer hires an independent contractor to conduct risky work and fails to exercise reasonable care to provide for precautions.[6] Plaintiff's argument must fail. As Judge Giles said in *Rivera v. St. Peter and Paul Sch.*, No. 1990-85 (D.V.I. Oct. 18, 1991), a case eerily similar to the instant one,[7] the theory of direct negligence under Restatement (Second) §§ 410-415 applies only when a landowner "retains the control of any part of the work" performed by the independent contractor. *Rivera, supra*, slip op. at 4.[8] Here, the record shows that Benak

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[6] Restatement § 413, entitled "Duty To Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor," provides that:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

[7] In *Rivera*, the plaintiff, an employee of an independent contractor, was electrocuted while performing construction work on the property of the defendant. The accident occurred when the plaintiff moved the scaffolding and it hit a live power line. The plaintiff sued the defendant for direct negligence under Restatement §§ 410-415, as well as the failure to disclose a dangerous condition under § 343. The defendant moved for summary judgment, arguing that he had no control over the work site and that the plaintiff was aware of the power line's danger. The court granted the defendant's motion.

[8] Similarly, Judge Brotman stated in *Dubique*: "To impose liability on an employer of an independent contractor, *the plaintiff must prove the employer retained control over the actual conduct of the work or assumed affirmative duties with regard to safety,*

Construction and its employees, and not Quality Electric, controlled the work site. Monk stated that he reported to his father and to Bill Benak only and not to any member of Quality Electric. (Dep. of Monk at 21.) Additionally, Benak Construction brought in the crane operator, who worked for another independent contractor, and directed his actions, whereas Quality Electric had no control over the crane operator. (Dep. of Monk at 23) ("[H]e [the crane operator] was there to work for us.")

Monk attempts to create a triable issue of "control" where none exists. He points to the fact that employees of Quality Electric often walked by the work site to check the project's progress. However, the record is clear that these Quality Electric employees were not at the site in a supervisory role but rather simply passed by on their way to their temporary offices which were located next door. (Dep. of Karl Bauknight "Bauknight" at 10.) *See also Rivera, supra,* slip op. at 4-5 (court granted summary judgment on issue of direct negligence where facts indicated employer of independent contractor had no control over work site).

Even if Quality Electric were found to have retained control of the site and § 413 were found applicable, Quality Electric adequately met its obligation of "reasonable care" as provided in subsection (b) of § 413. Members of Quality Electric addressed the issue of the power lines with Benak Construction and Benak Construction accepted that it was their responsibility to deal with the power lines and to contact WAPA about possible dangers posed by the lines. ((Dep. of Bauknight at 8, 9, 18 ("I [President of Quality Electric] was reassured by Benak and Monk that they were familiar with the proper techniques and that [the power lines] was not my concern.")); ((*See* Dep. of Bill Benak at 27-28 ("[I] spot-

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and that the employer was negligent in the exercise of control of his duties." *Dubique, supra,* slip op. at 16 (citations omitted) (emphasis added).

ted them [the power lines] and *I brought them to the attention of my superintendent* and they were brought to the attention of WAPA. *We* had the WAPA guy come out.")); ((Dep. of Christoff at 7, 41) (discussing conversation he had with his boss, Benak, concerning the need to possibly get the lines rerouted and how he, Christoff, personnally contacted WAPA.))

Additionally, subsection (a) of § 413 provides that an employer of an independent contractor can escape liability if he contractually provides that the independent contractor is to take the necessary precautions to alleviate the safety risk. Although not dispositive, the parties' contract in the instant case specifically incorporates the American Institute of Architects ("AIA") standard form. (Ex. F of Def. Quality Electric's Reply Mem. in Support of Mot. for Summary Judgment ("Quality Electric's Reply.")) Under the applicable AIA sections, the responsibility for the work site and all related safety precautions was delegated to Benak Construction. (Ex. G of Quality Electric's Reply.)

Finally, it is questionable whether the instant job even comes within the purview of creating a "peculiar unreasonable risk" as stated in § 413.[9] The comments to § 413 make clear that the section is "not concerned with the taking of routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work." Restatement (Second) § 413, comment b. Although electrical power lines may constitute a peculiar risk in other circumstances, based on the facts of this case where it is clear that Monk and all other members of Benak Con-

[9] According to deposition testimony, Benak Construction had worked on other projects where the power lines were in an even closer vicinity than in the instant case, and Benak Construction did not consider the situation at the Quality Electric site to be a problem. (Dep. of Monk, Sr. at 35.); (Dep. of Bauknight at 8).

struction were clearly aware that the lines were energized and dangerous, section 413 liability is not created. As one court has noted in delineating the meaning of "peculiar risk" as used in the Restatement (Second):

> We believe the presence . . . of electric transmission and distributions lines is a matter of common knowledge and a . . . contractor can reasonably be expected to take precautions against contacting them. *Hence we do not think the presence of the high line in the present case was a "peculiar risk"* . . . .

Porter v. Iowa Power and Light Co., 217 N.W.2d 221 (Iowa 1974) (citations omitted) (emphasis added). *But see Bloom v. Waste Management, Inc.*, 615 F. Supp. 1002, 1010 (E.D. Pa. 1985) (finding that the presence of uninsulated energized wires near construction zone created unreasonable risk), *aff'd without op.*, 800 F.2d 1131 (3d Cir. 1986).[10]

B. *Liability Under Restatement § 343A*

Plaintiff next argues that Quality Electric, as a landowner, is liable under Restatement (Second) section 343A for failing to take steps to protect Monk, a business invitee, from the danger of the power lines. This argument, too, must fail.

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[10] Given the inherent danger in the construction industry, and the particular facts of this case which indicate plaintiff's clear knowledge of the danger, it is important to construe "peculiar risk" narrowly lest the exception envelop the general rule of nonliability as stated in Restatement (Second) § 409. *See generally Marshal v. SEPTA*, 587 F. Supp. 258, 264 (E.D. Pa. 1985) (in case granting directed verdict for defendant, court said: "In order for the liability concepts involving contractors to retain any meaning, especially in industries such as construction where almost every job task involves the potential for injury unless ordinary care is exercised, *peculiar risk situations should be viewed narrowly, as any other execption to a general rule is usually viewed.*") (emphasis added).

Section 343A of Restatement (Second) provides in relevant part:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

This exception extends to situations where the independent contractor and the landowner are equally knowledgeable of the dangerous conditions. *Hood v. Hess Oil Virgin Islands Corp.*, 650 F. Supp. 678, 682 (D.V.I. 1986). In this case, the deposition testimony makes clear that Benak Construction was, at the minimum, equally knowledgeable about the danger the power lines presented; accordingly § 343A is applicable. However, the facts of this case militate against liability. As Judge Giles stated in *Rivera*, when granting summary judgment to the defendant, in a similar situation:

> [Defendant] cannot be held liable under § 343. The dangerous condition was an electrical power line which stood in plain view and whose dangers are a matter of general knowledge. Indeed, [plaintiff] stated in his deposition that he had seen the power line upon beginning the paint job and appreciated its potential to kill, but then forgot about it and went to work. Moreover, the accident itself was caused by the movement of the scaffolding in such a way as to bring it into contact with the wire. The movement of the scaffolding was done at the direction, and under the supervision, of the independent contractor. All of these facts militate against § 343 liability.

Rivera, supra, slip op. at 4. Similarly, in the instant case, it was Monk's decision not to use a tag line and instead to hold onto the metal beam that precipitated his injuries. Monk cannot now try to shift the liability to Quality

Electric simply because they owned the land where the work was performed.

Quality Electric's motion for summary judgment is granted.

IV. *WAPA's Motion for Summary Judgment*

Monk has also brought a claim against WAPA who owned and maintained the power lines. As to this claim, a material issue of fact exists and thus summary judgment is inappropriate.

Monk and other members of Benak Construction allege that they contacted WAPA about turning off the power lines so that any danger would be alleviated. (*See* Dep. of Christoff at 9-14, 41); (Dep. of Monk, Sr. at 39-40); (Dep. of oJhn White ("White") at 9-11.) WAPA maintains that it was never notified of the construction or asked to shut off the electricity. Mem. of Law in Support of Defendant V.I. Water and Power Authority's Mot. for Summary Judgment at 6. Whether or not WAPA breached a duty owed to the plaintiff is a question of fact that must be resolved by a jury. *See generally Johns v. Pettibone Corp.*, 769 F.2d 724, 726-27 (11th Cir. 1985) (issue of whether power company had notice that persons might come into contact with wires cannot be disposed of by summary judgment); *Olson v. Virgin Islands Telephone Corp.*, No. 84-152 (D.V.I. May 29, 1986) (summary judgment denied where material issue of fact existed as to whether telephone company was negligent in failure to turn off power); *Bush v. Alabama Power Co.*, 457 So.2d 350 (Ala. 1984) (same).

V. *Conclusion*

There is no dispute that Monk was the victim of a serious, and almost fatal, incident. However, Monk cannot shift the liability for his accident onto a defendant who did not maintain any control over the work site and

who acted reasonably under the circumstances. Quality Electric's motion for summary judgment is therefore granted. However, WAPA, as the power company who maintained the power lines and as to whom there is a triable issue of negligence, will not be granted summary judgment. An appropriate order follows.

BY THE COURT:

/s/ Edward N. Cahn
EDWARD N. CAHN
Judge
Sitting By Designation

APPENDIX C

[Filed Feb. 4, 1994]

IN THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil Action No. 1991/0077

TED MARK MONK

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY &
QUALITY ELECTRIC SUPPLY CO.

ORDER

CAHN, J. January 24, 1994

AND NOW, this 24th day of January, 1994, upon consideration of defendants' motions for summary judgment, and plaintiff's response thereto, it is hereby ORDERED as follows:

1. Defendant Quality Electric's motion is GRANTED.

2. Defendant Virgin Islands Water and Power Authority's motion is DENIED.

3. This case shall be reassigned to another judge for all further proceedings.

BY THE COURT:

/s/ Edward N. Cahn
EDWARD N. CAHN
Judge
Sitting by Designation

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7372

TED MARK MONK,

Appellant

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY;
QUALITY ELECTRIC SUPPLY COMPANY

(D.C. Civ. No. 91-cv-00077)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS, McKEE
and SAROKIN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: May 15, 1995.

APPENDIX E

STATUTORY PROVISIONS

Title 1, § 4

§ 4. Application of common law; restatements

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

Title 24, § 284

§ 284. Exclusiveness of remedy

(a) When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.

(b) For the purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to comply with the provisions of this chapter with respect to being an insured employer. The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title.—Amended June 15, 1961, No. 762, Sess. L. 1961, p. 109; Feb. 27, 1986, No. 5145, § 1(a), Sess. L. 1986, p. 25.

Restatement (Second) (Torts), § 413

§ 413 Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.